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REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION

Report of the Secretary-General

Addendum

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II. COMMENTS RECEIVED FROM GOVERNMENTS

UNITED STATES OF AMERICA

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[5 August 1996]

1. In paragraph 8 of its resolution 50/45 of 11 December 1995, the General Assembly invites Governments to submit comments on the suggestion of the International Law Commission to include in its agenda the topic of diplomatic protection. The proposal was made by the Commission in its report on its forty-seventh session in 1995, 1/ in which the Commission notes that the topic could be considered as part of its long-term programme of work and could, inter alia, cover the content and scope of the rule of exhaustion of local remedies, the rule of nationality of claims as applied to both natural and juristic persons, problems of stateless persons and dual nationals, and the effect of dispute settlement clauses on domestic remedies and on the exercise of diplomatic protection.

2. The United States Government considers that a study of the topic of diplomatic protection by the Commission could provide useful insight on relevant developments in State practice and on relevant rulings by international tribunals. We agree that this would complement the Commission's work on State responsibility. We suggest that the Commission begin its work with such a study, which could be prepared by a special rapporteur and discussed in sessions of the Commission itself. Based on the Commission's conclusions and on further comments from Governments, subsequent decisions could be made by the Commission and the General Assembly on the utility of proceeding with further work on the subject.

3. The United States understands this topic to involve the procedural prerequisites and conditions for the exercise of formal diplomatic protection by a State on behalf of its national, i.e., the espousal of a claim of a national against the Government of another State. There are, of course, many ways short of this in which Governments seek to advance the interests of their nationals, but we do not see such techniques as legitimately falling within the proposed agenda topic. Further, while this topic would necessarily address the need for an allegation of a violation of an international law obligation of State responsibility as a prerequisite for espousal, the specific content of those international law obligations would fall outside the scope of this topic.

4. As the Commission recognizes in its report, 1/ the rule of exhaustion of remedies is a critical issue in the work on this topic. That rule was most recently considered by the International Court of Justice in its judgment of 20 July 1989. 2/ That judgment is a strong endorsement of the established principles of exhaustion in the case of an espoused claim, regardless of whether a parallel treaty obligation violation may be alleged. However, the judgment also recognizes that the exhaustion requirement is fulfilled in a case in which the national had recourse to all domestic remedies that appeared available at

the time without necessarily having had recourse to procedures that theoretically, with the benefit of hindsight, might have been available.

5. In the context of consideration of the exhaustion requirement, the Commission would surely wish to consider those situations in which recourse to domestic remedies is not required. Those situations presumably include not only demonstrable futility in utilizing local court or administrative proceedings (e.g., because of the lack of a legal remedy, demonstrated bias of the system or unduly lengthy delay in affording a remedy in the system), but for example, the inability of the claimant to travel safely to the site where local remedies may be exercised and certain other situations in which State practice makes clear that no exhaustion is required (e.g., espousal of large numbers of similarly situated claims in a lump-sum claims agreement context and espousal of large numbers of similarly situated claims).

6. The rule of nationality also presents many interesting issues for consideration. With respect to dual nationals of the claimant and respondent States, the Iran-United States Claims Tribunal has held that international law requires that the individual be a dominant and effective national of the claimant State. In practice, this rule is fact-intensive, judgemental and hard to apply, and the United States has traditionally favoured having the broadest latitude to espouse the claims of any individuals who hold its nationality. On the other hand, with rare exceptions, there is no acceptance of the right to espouse claims of non-nationals, and in this regard paragraph 19 of decision 1 3/ and paragraph 12 of decision 7 4/ of the Governing Council of the United Nations Compensation Commission constitute lex specialis. One issue that has arisen several times in recent years involves wrongful death claims, in which the victim is of one nationality and the beneficiary on whose behalf the claim is made is of another nationality. Apart from the difficulties this may cause in the case of an individual espousal, in the context of a mass espousal (e.g., on behalf of all the victims of a particular incident) in which some beneficiaries are not nationals of the espousing State, the question of the legal entitlement of the espousing State to espouse and settle the claims arises.

7. The rule of nationality as applied to juridical persons continues to be contentious (para. 26 of decision 7 4/ of the Governing Council of the United Nations Compensation Commission is evidence of this) and warrants reassessment. Many international agreements give States the right to make complaints on behalf of their juridical persons in situations that are broader than those announced in Barcelona Traction, and the Commission may wish to survey practice to see whether a more liberal rule is emerging.

8. The Commission might note, for example, the definition contained in article VII (2) of the declaration of the Government of the Democratic People's Republic of Algeria concerning the settlement of claims by the Government of the United States of America and the Government of the Islamic Republic of Iran. Additional issues that warrant clarification concern application of the rule of nationality to shareholder, partnership and joint-venture claims.

9. A series of issues concern the continuity of nationality and the transferability (or assignability) of claims. The United States regards the

rules of continuous nationality and free transferability of claims (espousable claims can only be transferred among natural or juridical persons of the same nationality) as accepted.

10. Another requirement for espousal that warrants Commission review is the requirement that State responsibility be engaged. For this to be the case, the espousing State presumably has to allege a violation of State responsibility by the respondent State that is prima facie credible.

11. How and when a claim is espoused is also a matter that bears attention. In the case of a lump-sum claims settlement, often the settlement does not recite that the claims in question have been espoused, but the mere fact that they are settled and discharged by the terms of the agreement establishes that the claims in question have been espoused. Absent any specific declaration by the espousing State that the claims are being espoused at a particular point in time, the question is whether such claims should be considered espoused, for example, at the outset of the negotiations, or only at the point at which agreement is reached, or at some other time (since once the claim is espoused the national in question presumably no longer has any right to pursue the claim privately). In this connection, it would also be worth while to consider the process by which an espousing State may cease to espouse a claim or claims, thus returning to the claimant the individual capacity to pursue and settle the claim as a private matter. The timing and process for espousal and for ceasing espousal clearly have legal consequences for both the nationals and the States involved, and it would be useful for the Commission to consider them.

12. In its report 1/ the Commission raises the issue of the effect of dispute settlement clauses on domestic remedies and on the exercise of diplomatic protection. It is unclear to what this comment refers. A dispute settlement clause in an international agreement would obviously have to be considered and applied in accordance with its own terms, independent of the customary rules of international law concerning espousal. Whether there was a domestic remedies requirement would depend on the terms of the clause. On the other hand, a dispute settlement clause in the national's private law contract would presumably be considered as among the potential avenues of recourse of the national under the applicable domestic law and would need to be considered in connection with a review of whether domestic remedies had been exhausted.

Notes

1/ Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), para. 505.

2/ Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy) Judgment of 20 July 1989, I. C. J. Reports 1989, paras. 49-63.

3/ See S/22885, annex II.

4/ See S/23765, annex.